

REMARKS

The claims have been amended to place them in a format more customary to US patent practice and to address the claim objections. Support of the "contains essentially no emulsifier" limitation in claim 1 can be found in the original claim language of claim 1. Support for new claim 13 can be found, for example, at page 3 lines 26-30 of the specification. Support for new claim 14 can be found, for example, at page 4 lines 6-9 of the specification. Support for new claim 15 can be found, for example, at page 5 lines 1-2 of the specification. Support for new claim 16 can be found, for example, at page 4 lines 24-33 of the specification. Support for new claim 17 can be found, for example, at page 4 lines 10-15 of the specification. No new matter has been added.

Rejections under 35 USC §103

Claims 1-6 and 8-13 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Lennon et al. (US 2003/0165451), in view of Rabe et al. (US 6,019,962). Claim 7 stands rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Lennon et al. (US 2003/0165451) in view of Rabe et al. (US 6,019,962) and further in view of Suzuki et al. (US 5,219,560).

Lennon et al. (US 2003/0165451) discloses a W/O emulsion comprising at least one organic powder, one emulsifier and a semicrystalline polymer. As can be seen at paragraph 0010 of Lennon et al., it is the object of the invention to provide an improved W/O emulsion, especially in cream or in solid form with a light and fresh feel and a good stability which does not need the usual consistency factors such as waxes. Lennon et al. seeks an alternative to the use of waxes as consistency factors for W/O emulsions and to simultaneously improve the skin feel of the composition. There is no mention at all of water resistance. Paragraphs 0109-0120 of Lennon et al. are dedicated to the disclosure of suitable emulsifiers.

At page 3 of the Office Action, the Examiner alleges that the compositions of Lennon et al. contain as low as 0.1% of an emulsifier, which meets the limitation "essentially no emulsifying agent". See *In re Marosi*, 710 F.2d 799, 803, 218 USPQ 289, 291-292 (Fed. Cir. 1983) in which the courts interpreted "essentially free" to mean that a material is present only as an unavoidable impurity. Lennon is teaching a skilled worker to actively add emulsifier,

thus regardless of the amounts taught in Lennon, the emulsifier is not unavoidable.

Thus, Lennon et al. does not teach or suggest a cosmetic complex that is water resistant and contains essentially no emulsifier.

As the Examiner notes on page 3 of the Office Action, Lennon et al. also does not teach the claimed water-repellent cross-linked polyester having a molecular weight of 600-8000 and consisting of polyvalent alcohols and dicarbonic acids. For this, the Examiner relies upon Rabe et al (US 6,019,962). However, like Lennon above, the compositions of Rabe et al. contain emulsifiers. See for example, Col. 5, line 6; Col. 7, lines 38-41 and Col. 9, lines 53-64. For this reason alone the combination fails to suggest the claims.

Moreover, Rabe et al. teaches cross-linked polyesters (e.g. glycerine/diethylene glycol/adipate crosspolymers) which are used in cosmetic compositions for improving transfer-resistance and long wearing properties of the compositions. It is an object of Rabe et al. to improve the overall performance of long-wearing cosmetic compositions (see col. 1, lines 14 - 15). A further object of Rabe et al. is to enhance the resistance of cosmetic compositions, for instance lip compositions, to solvents such as food oils once applied to the skin (see col. 2, lines 47 - 48). Further the sticking resistance to the skin should also be enhanced so that cosmetic compositions do not come off onto table wear such as caps and napkins (col. 2, lines 43 - 44). Like Lennon above, Rabe is silent regarding improvement of water resistance. Rabe et al. concentrates on resistance to food oils and the improvement of the cohesive energy between the cosmetic composition and the skin. Thus, there is no teaching that motivates a skilled worker to use the polyesters mentioned by Rabe et al. to achieve a high water resistance.

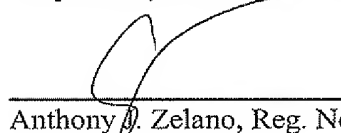
Suzuki et al. (US 5,219,560) does not cure the deficiencies of Lennon et al. and Rabe et al. Suzuki et al. is relied upon for teaching cross-linked silicone polymers in a cosmetic composition to impart water repellency and water resistance. The Examiner's application of Suzuki et al. is hindsight reconstruction. As the court stated in *In re Fritch* 972 F.2d 1260, 23 USPQ2d 1780 (Fed. Cir. 1992), "it is impermissible to use the claimed invention as an instruction manual or 'template' to piece together the teachings of the prior art so that the claimed invention is rendered obvious." This court has previously stated, "One cannot use

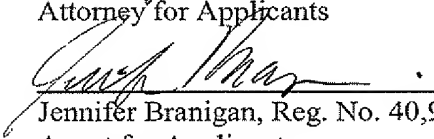
hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." Nothing of record gives any reason to combine Suzuki et al. with Lennon et al. and/or Rabe et al. In any event, nothing teaches excluding emulsifying agents from Lennon et al. and/or Rabe et al.

Taken together the references would in no way lead one skilled in the art to arrive at the complex of the present invention. Thus, it is respectfully requested that the rejections under 35 USC §103 be withdrawn.

The Commissioner is hereby authorized to charge any fees associated with this response or credit any overpayment to Deposit Account No. 13-3402.

Respectfully submitted,



Anthony J. Zelano, Reg. No. 27,969
Attorney for Applicants

Jennifer Branigan, Reg. No. 40,921
Agent for Applicants

MILLEN, WHITE, ZELANO & BRANIGAN, P.C.

Arlington Courthouse Plaza 1

2200 Clarendon Boulevard, Suite 1400

Arlington, VA 22201

Direct Dial: 703-812-5311

Facsimile: 703-243-6410

Attorney Docket No.:GULDE-69

Date: **12 March 2007**

jjb